

MAURICE MAY,

*Plaintiff,*

VS.

BRIAN E. WILLIAMS, SR., *et al.*

### *Defendants.*

2:10-cv-00576-GMN-LRL

## ORDER

This removed prison civil rights action comes before the Court on plaintiff's motion (#10) for relief from order.

In the motion, plaintiff Maurice May seeks partial reconsideration of the recent screening order (#9). In the order, the Court dismissed a number of claims without prejudice for failure to state a claim, with leave to amend to correct the deficiencies if possible. Plaintiff seeks reconsideration only of the dismissal without prejudice of the claim against Defendant Senior Correctional Officer Mikel. He “takes no issue with respect to the remainder of the court’s Order.”<sup>1</sup>

According to the allegations of the complaint, which are accepted as true for purposes of initial review, on the evening of June 13, 2008, while incarcerated at Southern Desert Correctional Center (SDCC), May activated the emergency call button. The John Doe or Jane Doe officers on post ignored May's emergency call for medical care. May had to bang on the cell door of the unit for several hours before a John Doe officer came to inquire as to what

^#10. at 2.

1 medical emergency May had. May reported to the officer that he was experiencing severe  
 2 pain in his groin and stomach area. He additionally had nausea and was vomiting. The John  
 3 Doe officer then called defendant Senior Correctional Officer Mikel and other John Doe or  
 4 Jane Doe officers.

5 The complaint alleges only as follows with regard to alleged acts or omissions by Mikel  
 6 after he was summoned by the John Doe officer:

7 . . . Defendant Mikel . . . came and talked to May and called  
 8 Defendant Daye [the nurse on call]. Defendant Daye made a  
 9 serious medical diagnosis over the telephone without examining  
 May.

10 Defendant's Mikel, John Does II-IV, and/or Jane Does II-IV  
 11 made a medical determination based upon Defendant's [sic]  
 12 Daye telling them he could do nothing, but give May some  
 ibuprofen's [sic].

13 #1-2, at 7b-7c.

14 Petitioner's appendix ruptured later that evening.

15 The Court held that these allegations failed to state a claim against Mikel, on the  
 following grounds:

16 Count I fails to state a claim of deliberate indifference to  
 17 serious medical needs under the Eighth Amendment against  
 18 defendant Mikel. According to the allegations of the complaint,  
 19 when Mikel was summoned by other officers, he responded,  
 listened to plaintiff's complaints, called the medical provider on  
 20 staff, and followed the medical provider's instructions. These  
 circumstances do not establish a violation of the Eighth  
 21 Amendment. In order to establish a violation, the evidence must  
 establish that the defendant official knows of and disregards an  
 22 excessive risk to inmate health or safety. *E.g., Clement*, 298 F.3d  
 23 at 904. The official both must be aware of the facts from which  
 the inference (of an excessive risk to inmate health or safety)  
 24 could be drawn, and he also must draw the inference. *Id.* The  
 allegations presented do not support an inference that the  
 25 correctional officer had any basis for knowing that the nurse's  
 assessment was incorrect. Mikel sought advice from the health  
 care provider on duty and followed it. Such action does not  
 violate the Eighth Amendment.

26 #9, at 3-4.

27 In seeking reconsideration, plaintiff contends: (1) that his only basis for asserting what  
 28 Daye said to Mikel was based upon Mikel's response to an informal grievance and that he

1 needs discovery to determine what Daye actually said to Mikel; (2) that there is an ongoing  
2 state inspector general's office investigation that may shed more light on Mikel's level of  
3 culpability in the case, which plaintiff should be allowed to explore in discovery; (3) that the  
4 complaint does not allege whether Mikel ever provided the ibuprofen and an informal  
5 grievance response reflects that Mikel stated only what he claims that Daye said and that  
6 Mikel then left the unit; (4) that May could have received the ibuprofen only if Mikel brought  
7 it to him or took him to the infirmary to receive it from Daye, neither of which Mikel did; and  
8 (5) that if Mikel had taken May to the infirmary, Daye may have physically examined him and  
9 correctly assessed his condition before his appendix ruptured.

10 With regard to plaintiff's first two contentions, the federal notice pleading standard  
11 "does not unlock the doors of discovery for a plaintiff armed with nothing more than  
12 conclusions." *Ashcroft v. Iqbal*, \_\_\_\_ U.S. \_\_\_, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009).  
13 Plaintiff first must state a claim. He may not overcome the failure to state a claim by asserting  
14 that he possibly may learn facts supporting a claim through discovery or further investigation.

15 With regard to plaintiff's remaining contentions, plaintiff needs to allege the facts  
16 supporting a claim against Mikel in the complaint. The Supreme Court has expressly rejected  
17 a prior pleading standard under which a complaint could not be dismissed for failure to state  
18 a claim unless it appeared beyond doubt that the plaintiff could prove no set of facts that  
19 would entitle him to relief. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 560-63, 127  
20 S.Ct. 1955, 1968-69, 167 L.Ed.2d 929 (2007). The facts supporting a claim against Mikel  
21 must be alleged in the complaint itself. Review for pleading sufficiency does not involve  
22 culling through documents attached with a complaint seeking to piece together facts and  
23 inferences that possibly might be argued to support a claim. Rather, plaintiff, again, must  
24 adequately allege his claims within the complaint. Similarly, the determination of whether the  
25 complaint states a claim is made according to the factual allegations made in the complaint  
26 itself, not those made in a motion seeking reconsideration. If plaintiff wishes to rely upon the  
27 factual assertions made in the motion as supporting a claim against Mikel, he needs to amend  
28 the complaint as the Court directed previously. The present allegations are insufficient.

The Court reserves consideration of whether an amended complaint alleging the facts in the motion would state a claim against Mikel until an amended complaint actually is filed.

IT THEREFORE IS ORDERED that plaintiff's motion (#10) for relief from order is DENIED.

IT FURTHER IS ORDERED that plaintiff shall have thirty (30) days from entry of this order to file an amended complaint as per the prior screening order (#9).

The Court will screen any such amended complaint before ordering any further action in the case.

DATED: July 12, 2010.

GLORIA M. NAVARRO  
United States District Judge